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No. 06-995

IN THE

Supreme Court of the United States

DANE INVESTMENTS, L.L.C.,

Petitioner,

v.

H & R BLOCK FINANCIAL ADVISORS, INC., FKA OLDE DISCOUNT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed enforcement of an NASD arbitral award denying petitioner recovery.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent H&R Block Financial Advisors, Inc. is a wholly owned subsidiary of HRB Financial Corporation, which, in turn, is an indirect wholly-owned subsidiary of H&R Block, Inc., a publicly traded company.

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BRIEF IN OPPOSITION

Respondent H & R Block Financial Advisors, Inc. (formerly known as Olde Discount Corporation ("Olde"), and referred to herein as "H&R Block"), respectfully submits this opposition to the petition for a writ of certiorari in this case.

STATUTORY PROVISION INVOLVED

9 U.S.C. § 10(a) provides that a district court:

> [M]ay make an order vacating the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT AND BACKGROUND

After allegedly suffering losses following the post-September 11, 2001 market pullback, Petitioner Dane Investments, L.L.C. ("Dane") instituted arbitration proceedings with the National Association of Securities Dealers ("NASD") against Respondent H&R Block. Petitioner claimed that it had little control or knowledge of its investments and that H&R Block was liable for its losses. In response, H&R Block presented evidence that Dane had confirmed, repeatedly, that it was "fully aware" that it held "several concentrated positions" and that it "accepted all responsibility and risk with this type of investing." See App. to Br. of Def.-Appellee ("App."), Tab 16. After a three-day hearing, which included testimony by expert and fact witnesses, the arbitral panel rejected Petitioner's claims. Pet. App. 11a. Both the district court, *id.* at 4a-5a, and court of appeals, *id.* at 1a-2a, affirmed the NASD's arbitral award.

Further review is not warranted because this case implicates no conflict among the courts of appeals. Rather, the Fifth Circuit, in a short, unpublished decision, issued a narrow, fact-intensive holding that "there are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disregarded relevant law in making the award." Pet. App. 1a-2a. That holding does not warrant certiorari.

Recognizing as much, Dane attempts to advance a new argument in this Court. According to Dane, the Fifth Circuit

erred because it failed to adopt an entirely different non-statutory standard for vacating an arbitral award under the Federal Arbitration Act. Specifically, Dane asserts that an award should be set aside whenever a court subjectively feels that the arbitral award causes "unconscionable results." Pet. i. But Petitioner did not present this question to the Fifth Circuit, and that court's decision does not remotely purport to address or resolve that legal question. Accordingly, Petitioner's legal argument is not properly before this Court. See, *e.g.*, *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (question presented in petition but not "raised in the Court of Appeals is not properly before us"); R. Stern et al., *Supreme Court Practice* 421 (8th ed. 2002) (citing cases).

Further, even if the issue had been preserved, the decision below in no way implicates any conflict regarding the allegedly varying standards adopted by the courts of appeals. Instead, Petitioner is asking this Court to adopt a wholly distinct ground for vacating arbitration awards based on subjective "unconscionab[ility]." Pet. 10. There is no conflict as to this issue because *no* circuit court recognizes an "unconscionable results" exception to the binding force of an arbitration.

That is not surprising because Petitioner's proposal, if accepted, would be a license for federal courts to disregard the decisions of arbitral panels whenever they subjectively disagree with the panel's factfinding. Such a license would be flatly contrary to the purposes of the Federal Arbitration Act and this Court's well-established jurisprudence, which limit vacatur of an arbitration to the statutory grounds provided in 9 U.S.C. § 10, and narrow circumstances that evince a manifest disregard of established law. See *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995).

Lastly, this case would be an improper vehicle to consider Petitioner's proposal because even if an "unconscionable results" standard were appropriate – and it is not – that standard does not assist Petitioner in this case. Here, the arbitral panel was presented with compelling evidence that Petitioner con-

sidered itself an aggressive investor, that Petitioner knowingly traded on margin in high-tech securities, and that Petitioner directed every trade executed in his account. The arbitral panel was entitled to credit the letter by Petitioner's president in which he admitted: (i) "I am fully aware that I hold several concentrated positions and accept all responsibility and risks with this type of investing." (ii) "I also am aware that I carry a margin balance of about 1.6 million dollars," (iii) "[i]t is my intent to trade in this manner," and (iv) "I accept full responsibility for any results that may occur." App., Tab 16.

Petitioner's other questions presented – regarding the effect of an SEC consent decree on the arbitral proceedings and a complaint that the audio recording of the arbitration allegedly was, in part, inaudible, *see* Pet. ii, 15-18, 18-20 – also are fact-specific issues with no relevance beyond this litigation. These issues present no basis for review by this Court.

In sum, the petition should be denied.

COUNTERSTATEMENT OF THE FACTS

1. Petitioner Dane is a limited liability company, established by Gregory D. Wilt, for the sole purpose of trading securities. Pet. 4. Petitioner is not an amateur investor. Over the course of a 20-year period, Dane engaged in an average of 50 trades per year, with each trade averaging 2,000 shares. App., Tab 4.[1]

Originally, Petitioner held an account with Fidelity Investments, where, as Petitioner acknowledges, it made significant investments on margin. Pet. 4. In 1995, Petitioner moved its account from Fidelity to H&R Block, and this transfer included Petitioner's substantial margin debt. App., Tab 5.[2] On numerous occasions, Petitioner expressly acknowledged on

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[1] *See* R000040, R000034, R000044; *see also* App., Tab 15 (R001100, R001105, R001107, R001118); *id.* Tab 13 (R000051).

[2] *See* R000002 (margin debit balance of $503,957).

H&R Block's account application that Petitioner was an "aggressive" investor that was investing for "speculation." *Id.* Tab 11 at 4.[3] Petitioner informed H&R Block that it had a preference for investing in technology stocks. *Id.*[4]

Petitioner argues that it was not, "de facto," in control of its account because of Mr. Wilt's travel schedule, Pet. 4, but H&R Block demonstrated at the arbitration hearing that it provided Petitioner with monthly statements that reflected Petitioner's margin balances and interest charged, and also that it sent mailgrams to Petitioner for margin calls. App., Tabs 8, 9. H&R Block specifically advised Petitioner to reduce its margin balance, but it declined to do so. App., Tab 14.[5] The evidence showed that Dane was aware of its risky investment strategy:

> Let it be known that I am fully aware that I hold several concentrated positions and accept all responsibility and risks with this type of investing. I am also aware that I carry a margin balance of about 1.6 million dollars . . . .
>
> It is my intent to trade in this manner . . . .
>
> I accept full responsibility for any results that may occur.

Id. Tab 16. When the stock market declined both before and after the terrorist attacks of September 11, 2001, so too did the value of Dane's investments.

2. Disappointed with its losses, on December 20, 2002, Dane filed an arbitration demand with the NASD, seeking $4 million in damages from H&R Block. The arbitration panel conducted a three-day hearing in which both sides presented extensive evidence. In addition to documentary evidence supporting the above facts, the parties presented both fact and

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[3] *See also* App., Tab 4 (R000040; R000034; R000042).

[4] *See* R000040, R000034, R000044.

[5] *See* R001049, R001052.

expert witnesses. On March 11, 2004, at the close of the hearing, both parties acknowledged that they had been afforded a full and fair opportunity to be heard.

On April 2, 2004, the arbitration panel issued its ruling finding that H&R Block was not liable and dismissing Petitioner's claims. Pet. App. 11a. Based upon its consideration of the evidence presented, the arbitral panel found "no liability on the part of Respondent for alleged violations of the Rules of Fair Practice or Claimant's allegation of overconcentration in unsuitable investments." *Id.* In its award, the panel also ruled that "[a]ny and all claims for relief not specifically addressed herein are denied." *Id.*

3. Petitioner filed a complaint in the United States District Court for the Eastern District of Louisiana, seeking to vacate the arbitral award. Petitioner argued that the arbitration panel exceeded its authority under 9 U.S.C. § 10, because it allegedly failed to consider a claim for breach of fiduciary duty. See Pl.'s Mem. in Supp. of Mot. to Vacate Arbitration Award (Dkt. No. 6) at 4-7. Petitioner further contended that the panel manifestly disregarded the law because it allegedly failed to consider an SEC consent decree. *Id.* at 12-15. (In fact, the Fifth Circuit would rule that "the panel . . . admitted and considered" the SEC consent decree. Pet. App. 2a).

On November 17, 2004, the district court issued its initial order granting Petitioner's motion to vacate. Pet. App. 6a. The district court held: "I believe that the unconscionable results in this particular case demonstrate [H&R Block] breached its fiduciary duty to Plaintiff insofar as the margin interest and brokerage fees are concerned, and the Panel should not have dismissed those claims." Pet. App. 7a. H&R Block sought reconsideration, and, on March 20, 2005, after further briefing and a hearing about the standards of review in arbitration cases, the district court reconsidered its prior decision and affirmed the NASD award. *Id.* at 4a-5a.

The district court noted its personal "frustration" with the limited review that applies to arbitration awards. Pet. App. 5a. However, in language that Petitioner omits from its petition, see Pet. 7-8, 10-11, the court ruled that the arbitration panel's conclusions were "honestly arrived at with a sufficient minimum of due process." Pet. App. 5a. The court further concluded that "[t]he basic conditions for arbitration have, for all practical purposes, been met." *Id.*

4. On appeal to the Fifth Circuit, Petitioner revived old arguments and advanced new ones. See Br. of Pl.-Appellant at 1-2.[6] For example, Petitioner claimed that the mandatory arbitration agreement was "void *ab initio* due to unconscionability" because it was one-sided. *Id.* at 27-30. H&R Block responded by showing both that the arbitration agreement was binding on *both* Dane *and* H&R Block and that Petitioner could not challenge the arbitration clause as unconscionable because *Petitioner* had initiated the arbitration proceeding. See Br. of Def.-Appellee at 24. Petitioner filed no reply brief.

On October 19, 2006, the Fifth Circuit affirmed in an unpublished per curiam order. Pet. App. 1a-2a. The court was "satisfied that there are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disre-

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[6] Petitioner presented only the following issues to the Fifth Circuit:

I. Whether a cease and desist order issued by the Securities and Exchange Commission against appellee for the same acts used gainst appellant should be enforced.

II. Whether the arbitrators manifestly disregarded the law and/or impermissibly exceeded their powers in failing to address the issue of fiduciary duty owed by appellee to appellant . . . .

III. Whether the arbitrators manifestly disregarded the NASD Rules of Fair Practice in arriving at their decision.

IV. Whether appellee can assert Michigan law or any choice of law provision before the tribunals in this case . . . .

V. Whether appellant can challenge a mandatory arbitration provision as void ab initio due to unconscionability.

See Br. of Pl.-Appellant at 1-2 ("Statement of the Issues") (internal citations omitted).

garded relevant law in making the award." *Id.* at 1a-2a. The court also concluded that "Dane was an aware, sophisticated, and particularly aggressive investor." *Id.* at 2a. Finally, the court rejected the argument that the agreement to arbitrate was "unconscionable" because "Dane voluntarily brought its claims before the panel and it may not revisit that decision now, having received an adverse judgment." *Id.*

On January 17, 2007, Dane filed its petition with this Court.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER'S "UNCONSCIONABLE RESULTS" THEORY WAS NOT PRESENTED TO THE FIFTH CIRCUIT AND DOES NOT OTHERWISE WARRANT REVIEW BY THIS COURT.

A. Review should be denied because Petitioner never argued to the Fifth Circuit that it should adopt an "unconscionable results" standard for vacating arbitral awards. Nor did the Fifth Circuit *sua sponte* rule on this novel proposal. Accordingly, this issue has been waived. See Stern, *supra* at 421 (citing cases).

The sole question Petitioner asked the Fifth Circuit to decide with respect to "unconscionability" was "[w]hether appellant can challenge a mandatory arbitration provision as void *ab initio* due to unconscionability." Br. of Pl.-Appellant at 1-2 (Statement of Issues). Petitioner alleged that the arbitration agreement was unfair because it compelled the arbitration of its grievances, while leaving Respondent with the option of turning to the federal courts. *Id.* at 27-30. The Fifth Circuit properly rejected that argument, explaining: "Dane's contention that the arbitration clause in its agreement with [H&R Block] is unconscionable and void is foreclosed because Dane voluntarily brought its claims before the panel

and it may not revisit that decision now, having received an adverse judgment." Pet. App. 2a.[7]

To be sure, Dane's Fifth Circuit brief does state, in passing, that "[c]harging $789,561.20 to convert over to Olde's . . . stocks or other recommended stocks is unconscionable." Br. of Pl.-Appellant at 21. That sentence was not enough to preserve the question that Petitioner raises here. Indeed, Petitioner's stray reference to the word "unconscionable" appears within Petitioner's argument in the Fifth Circuit that the arbitral panel "disregarded the law" reflected in the NASD's rules of conduct. *Id.* at 22-23. A complaint that the arbitral panel failed to follow the NASD's rules of conduct is not remotely the same as Dane's current claim that there should be "other non-statutory grounds, such as 'unconscionable results' acceptable as independent grounds for vacatur." Pet. i.

As a result, Petitioner cannot assign error to the Fifth Circuit for failing to decide an issue that Petitioner never presented. See, *e.g., Delta Airlines*, 450 U.S. at 362 (question presented in petition but "not raised in the Court of Appeals is not properly before us"); *Cooper Indus. Inc.* v. *Avaiall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("'We ordinarily do not decide in the first instance issues not decided below.'") (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001)); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). Petitioner's waiver presents an insuperable bar to review in this Court.

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[7] In fact, the arbitration agreement was not one-sided. NASD rules obligate defendants to submit to arbitration "upon the demand of the customer." NASD R. 10301(a). The agreement here merely granted Respondent the reciprocal ability to compel arbitration. App., Tab 13 (R000052) ("The parties are waiving their right to seek remedies in court, including the right to jury trial.").

B. Nor does this case implicate a conflict among the federal courts of appeals as to whether "unconscionable results" is an appropriate standard for vacatur of an arbitral award.

Although Petitioner quotes at length a survey of vacatur law among the various courts of appeals, Pet. at 11-13 (quoting *Brabham* v. *A.G. Edwards & Sons, Inc.* 376 F.3d 377, 385 (5th Cir. 2004)), none of the cases cited has held, or even suggested, that an arbitral award can be set aside if the reviewing court merely concludes that it effects an "unconscionable result." In contrast, every circuit, including the Fifth Circuit in the decision below, accepts an arbitrator's "manifest disregard of the law" as a non-statutory ground for vacatur. Pet. App. 1a-2a. That accepted standard for vacatur was the principal basis that Petitioner advanced below, and the Fifth Circuit expressly and squarely rejected that argument. *Id.* ("[T]here are no grounds for holding that the arbitration panel exceeded its authority or that it manifestly disregarded relevant law in making the award.").

Likewise, Petitioner makes no argument that the decision below would have been different if the Fifth Circuit had applied the law of another circuit in assessing whether the arbitral award was in "manifest disregard" of the law. Nearly all of the courts of appeals share the identical test for determining whether there has been a manifest disregard of law.[8] Admittedly, the Seventh Circuit appears to have adopted a some-

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[8] *See Advest, Inc.* v. *McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Greenberg* v. *Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000); *Dluhos* v. *Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003); *Patten* v. *Signator Ins. Agency, Inc.*, 441 F.3d 230, 236-37 (4th Cir.), *cert. denied*, 127 S. Ct. 434 (2006); *Dawahare* v. *Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *McGrann* v. *First Albany Corp.*, 424 F.3d 743, 750-51 (8th Cir. 2005); *Carter* v. *Health Net of Cal., Inc.*, 374 F.3d 830, 837-38 (9th Cir. 2004) *Hollern* v. *Wachovia Sec., Inc.*, 458 F.3d 1169, 1176 (10th Cir. 2006); *B.L. Harbert Int'l, LLC* v. *Hercules Steel Co.*, 441 F.3d 905, 910 & n.2 (11th Cir. 2006); *Kurke* v. *Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 & n.3 (D.C. Cir. 2006)..

what different articulation. See *Wise* v. *Wachovia Sec., LLC*, 450 F.3d 265, 268 (7th Cir.) ("[W]e have confined [the manifest disregard of law ground] to cases in which arbitrators direct the parties to violate the law.") (internal quotation marks omitted), *cert. denied* 127 S. Ct. 582 (2006). But the Seventh Circuit's test is not implicated here because, if anything, it is even *more* restrictive than the Fifth Circuit's standard and therefore would have offered no comfort to Petitioner. *Id.* Moreover, no conflict between the Fifth and Seventh Circuits is implicated because Petitioner has not and cannot argue that the arbitral award has directed the "parties to violate the law." Cf. Stern, *supra* at 231 ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

Finally, although a few circuits have formulated additional non-statutory grounds for vacatur, such as when a panel's ruling is "arbitrary and capricious" or "violates public policy," those standards likewise are irrelevant because Petitioner never raised these grounds as a basis for vacatur in the Fifth Circuit. See, *e.g.*, *Lifecare Int'l, Inc.* v. *CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995) (affirming arbitral award alleged to be "arbitrary and capricious"). Because Dane never advanced these arguments below, it cannot raise them here. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised nor involved in the lower court."). Indeed, Petitioner has not and cannot make any argument that the decision below would have been different if the Tenth Circuit's "arbitrary and capricious" ground for vacatur had applied to his case. *See Lifecare Int'l Inc.*, 68 F.3d at 435 ("arbitrary and capricious" test is "a very difficult standard for the party contesting the arbitration award to overcome" because it permits vacatur "only if there is no ground whatsoever for the Panel's decision").[9]

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[9] Perhaps recognizing that the case law does not support its proposed standard, Dane makes a fall-back argument: that "unconscionable results" may be a species of "manifest disregard of the law." Pet. 15. But Dane

C. The fact that no court of appeals has adopted petitioner's "unconscionable results" test is not surprising. This Court has consistently held that the standard for reviewing arbitration awards is exceedingly narrow. In *First Options*, this Court noted that "where the party has agreed to arbitrate," that party has all but "relinquished" the "right to a court's decision about the merits of its dispute." 514 U.S. at 942; cf. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 614, 628 (1985) ("Having made the bargain to arbitrate, the party should be held to it").

Although a party to an arbitration "can ask a court to review the arbitrator's decision," a "court will set that decision aside only in very unusual circumstances." *First Options*, 514 U.S. at 942. Under 9 U.S.C. § 10, an award can be vacated only if it is "procured by corruption, fraud, or undue means" or if the "arbitrator exceeded his powers." *First Options*, 514 U.S. at 942. Likewise, "parties are bound by [an] arbitrator's decision [that is] not in 'manifest disregard' of the law." *Id.* (quoting *Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953)).

In stark contrast, the amorphous "unconscionable results" test proposed by Petitioner would grant reviewing courts *carte blanche* to second-guess the arbitral panel's factual determinations and thus supplant the parties' contractually chosen means of resolving disputes. That approach cannot be squared with the FAA's intent and this Court's holdings that judicial scrutiny of arbitral awards is necessarily and exceedingly limited. See *id.*; *Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 62 (2000) ("as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact

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offers no reason to supports its assertion. A court's subjective conclusion that an arbitral award effects an "unconscionable result" does not depend upon whether (i) the governing law has been ignored or (ii) the arbitral panel engaged in arbitrary and capricious or irrational factfinding or legal reasoning.

that 'a court is convinced he committed a serious error does not suffice to overturn his decision.'") (alteration in original) (quoting *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987)).

D. Finally, the purported "conflict" that Dane advanced is irrelevant to what was, in essence, a factual dispute resolved by the arbitral panel against Petitioner. Indeed, Petitioner's "unconscionable result" standard, which is never defined, is tied inextricably to the facts of this case. Pet. 10 (arguing that "the actions of the respondent, in charging almost $800,000 to lose almost all of petitioner's assets, were unconscionable"). But there is nothing unconscionable in the arbitration panel's finding that an investment firm was not liable to an "aware, sophisticated, and particularly aggressive" investor, Pet. App. 2a, whose losses were incurred while investing on margin in risky technology stocks in the midst of a stock market decline. Nothing in the law makes an investment firm a guarantor for the losses incurred by its customers.

II. THE REMAINING QUESTIONS PRESENTED BY PETITIONER DO NOT WARRANT REVIEW.

A. Petitioner also contends that the arbitration panel should have admitted and considered an SEC consent decree that it claims was related to this dispute. Pet. i-ii, 15-18. This case-specific argument is particularly puzzling because the Fifth Circuit concluded that "the panel . . . admitted and considered it." Pet. App. 2a.

Nor can Petitioner obtain review of whether the arbitral panel should have given the SEC enforcement decree controlling weight. See Pet. 18 ("The petitioner asked the arbitration panel to treat the consent decree as a legal finding of wrongdoing"). Under this Court's established doctrine on vacatur, Petitioner cannot set aside the arbitration's findings simply because it "believes its own interpretation . . . would be the better one." *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 764 (1983); see *United Paperworkers Int'l Union* v.

Misco, Inc., 484 U.S. 29, 38 (1987). Further, as the court below explained, "the [arbitral] panel probably should not have even admitted the consent order into evidence (it certainly was not 'enforceable' by the panel)." Pet. App. 2a. Finally, any purported error regarding the weight given to the SEC consent decree in this NASD arbitration is a fact-intensive issue whose resolution will have no impact beyond the parties to this dispute. Accordingly, this issue does not warrant further review by this Court.

B. Dane argues that because the tape recording of the proceedings before the arbitration panel allegedly was inaudible, Petitioner was denied "his constitutional rights to due process and trial by jury." Pet. 18 (capitalization omitted). Petitioner does not dispute that the arbitral proceedings were audiotaped in accordance with the NASD's Rules. See *id.* at 2 ("'A verbatim record by stenographic reporter or a tape, digital, or other recording of all arbitration hearings shall be kept'") (quoting NASD Uniform Code of Arbitration 10326). Petitioner insists, however, that the entire arbitration must be vacated because, even though an audiotape of the proceedings was taken, when Petitioner tried to have the tapes transcribed, "the court reporter could not do so." *Id.* at 19.

Petitioner's argument provides no basis for granting review. Tellingly, Petitioner does not suggest how the availability of that transcript would have altered the district court's review. Cf. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). Nor does Petitioner explain how the NASD, when it acts in the limited capacity of administering arbitration proceedings, can be a state actor subject to the Constitution. See, *e.g.*, *D'Alessio* v. *SEC*, 380 F.3d 112, 120 n.12 (2d Cir. 2004) ("The National Association of Securities Dealers ('NASD') . . . is not a state actor subject to due process requirements."). Finally, this argument, like others in the Petition, was neither raised before nor decided by the Fifth Circuit and thus is waived.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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